RECORD AND BRIEFS

No. 16-1067

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In the Supreme Court of the United States

CHARLES MURPHY,

Petitioner,

v.

ROBERT SMITH AND GREGORY FULK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

When a prisoner obtains a monetary judgment in a suit under 42 U.S.C. § 1983 and the prisoner's lawyer is awarded attorney's fees, "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C. § 1997e(d)(2). The defendant pays the remainder of the attorney's fees.

The question presented is whether the parenthetical phrase "not to exceed 25 percent" means *any amount up to 25 percent* (as four circuits hold), or whether it means *exactly 25 percent* (as the Seventh Circuit holds).

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BRIEF FOR PETITIONER

Petitioner Charles Murphy respectfully requests that this Court reverse the judgment of the U.S. Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit is published at 844 F.3d 653 (7th Cir. 2016). Pet. App 1a. The opinion of the District Court is unpublished. Pet. App. 17a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 21, 2016. The petition for certiorari was filed on March 2, 2017. This Court granted certiorari on August 25, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1997e(d)(2) provides in relevant part: "Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant."

The complete text of 42 U.S.C. § 1997e is reproduced in the Appendix to this brief.

STATEMENT

When a plaintiff prevails under 42 U.S.C. § 1983, the district court has the discretion to order the defendant to pay the plaintiff's attorney's fees. 42 U.S.C. § 1988(b). Where the plaintiff is a prisoner

who wins a monetary judgment, the Prison Litigation Reform Act requires that some portion of the attorney's fees be paid by the plaintiff, out of the sum he recovers in the judgment. In such a case, "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C. § 1997e(d)(2). The balance of the attorney's fees is paid by the defendant.

Four of the five courts of appeals that have considered the issue, along with the vast majority of district courts, interpret the statute literally, to give the district court discretion to choose the "portion" the plaintiff must pay from the judgment, so long as that portion does not exceed 25 percent. These courts have been exercising the discretion the statute gives them. Where the defendant's conduct is especially egregious, the district courts have been apportioning responsibility for paying a greater share of the attorney's fees to the defendant, and a correspondingly smaller share to the plaintiff.

The Seventh Circuit, by contrast, has adopted an idiosyncratic interpretation of the statute that strips district courts of discretion to apportion attorney's fees. The Seventh Circuit's interpretation adds an unwritten provision to the statute, under which the attorney's fees must always come out of the judgment first. Only if 25 percent of the judgment is inadequate to pay the attorney's fees does the defendant have any responsibility to contribute to the fees.

Prisoner cases typically yield small damage awards and are time-consuming to litigate, so attorney's fees are rarely less than 25 percent of the judgment. In 2012, for example, in cases classified by

the Administrative Office of the U.S. Courts as prison conditions/prisoner rights cases, the median damages award was only $4,185. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. Irvine L. Rev. 153, 168 (2015). In 1993, shortly before Congress enacted section 1997e(d)(2), the median damages award was only $1,000. Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1602 (2003). Meanwhile, prisoner cases typically require plaintiff's counsel to invest considerable amounts of time. *Id.* at 1614-21, 1655-56. In our case, for example, plaintiff's counsel, a solo practitioner with limited resources, devoted hundreds of hours to the case. Pet. App. 18a.

Because 25 percent of the judgment is normally less than the amount of the attorney's fees, the Seventh Circuit's rule means that plaintiffs end up paying 25 percent of the judgment toward fees in virtually every case. The Seventh Circuit's interpretation of the statute denies district courts the discretion that Congress intended them to have—discretion they have been exercising for two decades—and leaves prisoners whose constitutional rights have been violated with smaller net recoveries than Congress intended them to receive.

1. Petitioner Charles Murphy was a prisoner at the Vandalia Correctional Center in Illinois. Pet. App. 2a. Respondents Robert Smith and Gregory Fulk were guards at the prison. Pet. App. 2a. One day at lunch, as Murphy reached his assigned seat in the prison cafeteria, he noticed food and water on his chair. Pet. App. 2a. He asked Smith to notify one of the inmates working in the cafeteria, whose job it

was to clean the chairs and tables. Pet. App. 2a; Tr. 670. Smith responded: "sit the F down ... clean it up yourself, use your hand." Tr. 670. Murphy replied: "I'm not going to use my hand when there's all type of Staph and bacteria stuff floating around and I got to turn around and use my hand to eat with." Tr. 670. Smith advised Murphy to "get the F out of my chow hall." Pet. App. 2a; Tr. 670.

As Murphy was leaving the cafeteria, another officer handcuffed him, with his hands behind his back. Pet. App. 2a; Tr. 671-72. Smith and Fulk escorted him to the prison's segregation unit. Pet. App. 2a; Tr. 673. As they did, Smith began shoving his finger into Murphy's ear, while saying "let me clean this nigger [sic] ears out. He can't hear. I'm cleaning his ears out." Pet. App. 2a; Tr. 718. When Murphy complained about the way he was being handled, Smith punched him in his right eye. Pet. App. 2a-3a. Smith and Fulk then applied so much pressure to Murphy's throat that he lost consciousness. Pet. App. 3a; Tr. 681. When Murphy awoke, Smith and Fulk were pushing him into a cell. Pet. App. 3a. Because his hands were still cuffed behind his back, Murphy fell face-first and hit his head on a metal toilet. Pet. App. 3a. Smith and Fulk removed Murphy's clothes and handcuffs and left him lying on the floor, naked, bleeding, in considerable pain, and in need of immediate medical attention. Pet. App. 3a; Tr. 683.

A nurse did not arrive until thirty to forty minutes later. Pet. App. 3a. Murphy was taken to the hospital, where it was found that his eye socket had been crushed. Pet. App. 3a. Murphy had eye surgery, but he has never fully recovered. His vision remains doubled and blurred. Pet. App. 3a.

Murphy filed this section 1983 suit against Smith, Fulk, and two other officers. Pet. App. 3a. The jury found Smith liable for an unconstitutional use of force and a state law battery. Pet. App. 3a. The jury found Fulk liable under the Eighth Amendment for deliberate indifference to a serious medical need. Pet. App. 3a. The jury awarded $241,001 in compensatory and punitive damages against Smith, and $168,750 in compensatory and punitive damages against Fulk. Pet. App. 3a. The district court reduced the combined award to a total of $307,733.82. Pet. App. 3a.

The district court awarded attorney's fees of $108,446.54. Pet. App. 28a. The court determined that under 42 U.S.C. § 1997e(d)(2), 10 percent of the judgment should be applied to the attorney's fees. Pet. App. 27a. As the court explained while approving the jury's award of punitive damages, in a separate order filed the same day as the order regarding attorney's fees, respondents' conduct was "reprehensible.... [B]rutality by those in a position of trust is a serious issue that justifies a substantial punitive damage award[ ]." 7th Cir. ER, 7:255 (doc. 175, p. 12). The district court accordingly ordered that Murphy pay $30,773.48 of the attorney's fees from the judgment, and that the balance of the attorney's fees be paid by the respondents. Pet. App. 28a.

2. The Seventh Circuit affirmed as to respondents' liability but reversed as to the apportionment of the attorney's fees. The court noted that the district court's allocation of 10 percent of the judgment toward attorney's fees "is consistent with decisions of other circuits, which allow such discretion." Pet.

App. 13a (citing *Boesing v. Spiess*, 540 F.3d 886, 892 (8th Cir. 2008), and *Parker v. Conway*, 581 F.3d 198, 205 (3d Cir. 2009)). But the court continued:

> We have read the statute differently. In *Johnson v. Daley*, 339 F.3d 582, 585 (7th Cir. 2003) (en banc), we explained that § 1997e(d)(2) required that "attorneys' compensation come[ ] first from the damages." "[O]nly if 25% of the award is inadequate to compensate counsel fully" does the defendant contribute more to the fees.

Pet. App. 13a. This interpretation, the court held, "is the most natural reading of the statutory text. We do not think the statute contemplated a discretionary decision by the district court. The statute neither uses discretionary language nor provides any guidance for such discretion." Pet. App. 13a.

The Seventh Circuit accordingly required Murphy to pay 25 percent of the attorney's fees from the judgment—a sum of $76,933.46—rather than the $30,773.48 ordered by the district court. Pet. App. 13a-14a.

SUMMARY OF ARGUMENT

Under 42 U.S.C. § 1997e(d)(2), the district court has discretion to apply less than 25 percent of the judgment to attorney's fees.

A. The statute's text provides that "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees." The statute sets an upper limit of 25 percent, but no lower limit. The statute does not say that the plaintiff must pay all of the attorney's fees except to the ex-

tent they exceed 25 percent of the judgment. Nor does the statute say that "the judgment" must be applied to attorney's fees, up to the 25 percent cap. Rather, the statute confers discretion on the district court to choose the "portion" of the judgment that should be applied to satisfy the fee award.

The Seventh Circuit perceived support for its erroneous view in *Gisbrecht v. Barnhart*, 535 U.S. 789 (2002). But the relevant passage in *Gisbrecht* involves a completely different question—what to do when an attorney is eligible for fees under two different statutes in the same case. This discussion in *Gisbrecht* has nothing to do with the interpretation of section 1997e(d)(2).

For more than twenty years, the vast majority of lower courts have interpreted the statute the way we do. During this period, Congress has considered amending the PLRA several times, but Congress has shown no interest in divesting the district courts of discretion to choose the appropriate percentage of the judgment to apply to attorney's fees.

B. The statute's context confirms that district courts have this discretion. When Congress provides for the award of attorney's fees, it normally authorizes district courts to exercise considerable discretion. The statutory scheme governing fees in prisoner cases is no exception. It preserves most of the district court's discretion over the amount of fees and how they should be apportioned. The wording of section 1997e(d)(2) is virtually identical to that of other statutes that plainly authorize district courts to exercise discretion over attorney's fees.

C. Discretion regarding the apportionment of attorney's fees best serves the purpose of the PLRA—to discourage frivolous prisoner suits and facilitate meritorious ones. Section 1997e(d)(2) is just one of several provisions in the PLRA that encourage attorneys to represent prisoners, and encourage prisoners to retain counsel, only in strong cases.

For two decades now, the district courts have been exercising their discretion under section 1997e(d)(2) to ensure that prisoners keep a greater share of their recovery, and that defendants pay more, in the more egregious cases, where there is the greatest reason to deter culpable conduct on the part of prison officials, and the greatest need for prisoners to retain counsel to help them seek relief. Where, as here, the defendant's conduct is especially shocking or culpable, district courts often apportion less than 25 percent of the judgment to attorney's fees. By contrast, where the defendant's conduct is less egregious, district courts often apportion the maximum 25 percent.

ARGUMENT

Under 42 U.S.C. § 1997e(d)(2), the district court has discretion to apply less than 25 percent of the judgment to attorney's fees.

Under 42 U.S.C. § 1997e(d)(2), the district court has discretion to apply less than 25 percent of the judgment to attorney's fees. The text of the statute confers this discretion. The statute's context confirms that district courts have this discretion. This literal reading of the statute best serves the purpose of the Prison Litigation Reform Act. Under any

method of statutory interpretation, the decision below is incorrect.

A. The text of the statute makes clear that the district court has discretion to apply any portion of the judgment up to 25 percent.

The text of the statute provides that the portion of the judgment to be applied to attorney's fees is "not to exceed 25 percent." 42 U.S.C. § 1997e(d)(2). The Seventh Circuit is wrong in interpreting this language to mean that the district court lacks discretion to apply less than 25 percent.

1. "Statutory interpretation, as we always say, begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Here, the text is so clear that interpretation can end there as well. The statute provides an upper limit of 25 percent, but it does not provide any lower limit. It gives courts discretion to decide what "portion" of the judgment should be applied to the attorney's fees, so long as that amount is no greater than 25 percent.

The Seventh Circuit reasoned that the statute does not use "discretionary language." Pet. App. 13a. But the statute *does* use discretionary language—"not to exceed 25 percent." This language provides a range of possible percentages, and within that range it leaves the appropriate "portion of the judgment" to the discretion of the district court. The only mandatory language in the statute is "shall," but "shall" modifies "be applied," not the percentage. The district court must apply *some* percentage of the judgment toward the attorney's fees, but the court

retains the discretion to determine that percentage so long as it does not exceed the 25 percent ceiling.

It hardly needs saying that the phrase "not to exceed" means "lesser than or equal to." For example, this Court often directs parties to file briefs "not to exceed" a certain number of words. *See, e.g.*, *Amgen Inc. v. Sandoz Inc.*, 137 S. Ct. 908 (2017) (Mem.) (ordering petitioner to file a brief "not to exceed 15,000 words"). On the Seventh Circuit's view, a brief of 14,999 words would violate this order, but to our knowledge the Court has never rejected a brief for being too short. Likewise, when a district court orders restitution in a criminal case, the court must "set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. § 3664(d)(5). On the Seventh Circuit's view, the district court could not set the date sooner than the 90th day. But this Court has sensibly interpreted "not to exceed 90 days" as a "90-day deadline," not a 90-day requirement. *Dolan v. United States*, 560 U.S. 605, 608 (2010).

If Congress had intended to deny district courts any discretion in the matter, Congress could easily have said so. For example, the statute could simply have provided that the plaintiff must pay "all" of the attorney's fees, except to the extent they exceed 25 percent of the judgment. But the statute does not say that. Congress might have dispensed with the word "portion" and provided that the "judgment must be applied" to attorney's fees, except to the extent fees exceed 25 percent of the judgment. But the statute does not say that either. This might have been another sensible method of allocating the attorney's fees, but it is not the method Congress chose. *Cf.*

Jones v. Bock, 549 U.S. 199, 216-17 (2007) (observing that the PLRA's exhaustion requirement must be construed literally, not by substituting the court's judgment for that of Congress); *Coleman v. Tollefson*, 135 S. Ct. 1759, 1763-64 (2015) (giving the PLRA's three-strikes provision a "literal reading"). The courts may not "rewrite the statute that Congress has enacted." *Puerto Rico v. California Tax-Free Trust*, 136 S. Ct. 1938, 1949 (2016) (citation and internal quotation marks omitted).

In their Brief in Opposition (BIO 13), respondents attempted to rescue the Seventh Circuit's interpretation of the statute by placing great weight on the word "satisfy." Respondents suggest that because a portion of the judgment must be applied to "satisfy the amount of attorney's fees," a defendant need not pay any portion of the attorney's fees until the plaintiff has reached the 25 percent cap.

No court to our knowledge has ever accepted this argument, for good reason. The statute explicitly designates the amount that must be applied to satisfy the amount of attorney's fees—"a portion of the judgment (not to exceed 25 percent)." The statute directs the court to choose the appropriate portion of the judgment, up to 25 percent, and then to use that portion to reduce the defendant's obligation to pay attorney's fees. The statute does not say that the *judgment* shall be applied to satisfy the attorney's fees, up to a maximum of 25 percent. It specifies that any "*portion* of the judgment," up to 25 percent, shall be applied to satisfy the attorney's fees. The statute leaves the size of that portion to the district court's discretion.

Because the text of the statute is clear, every other court of appeals to address the issue has had little trouble concluding that district courts have the discretion to choose a percentage less than 25 percent. *See Shepherd v. Goord*, 662 F.3d 603, 610 (2d Cir. 2011); *Parker v. Conway*, 581 F.3d 198, 204-05 (3d Cir. 2009); *King v. Zamiara*, 788 F.3d 207, 218 (6th Cir. 2015); *Boesing v. Spiess*, 540 F.3d 886, 892 (8th Cir. 2008). The vast majority of district courts have reached the same conclusion. *Kemp v. Webster*, 2013 WL 6068344, *5 & n.5 (D. Colo. 2013) (collecting cases). "The plain language of the 25-percent provision is unambiguous," the Third Circuit has noted. "The statute does not compel district courts to apply 25 percent of the judgment to pay attorney's fees when the attorney's fee award exceeds that amount." *Parker*, 581 F.3d at 204-05. As the Eighth Circuit has observed, "the phrase 'not to exceed 25 percent' clearly imposes a maximum, not a mandatory, percentage. This statute is not ambiguous." *Boesing*, 540 F.3d at 892.

2. The decision below was the Seventh Circuit's second case addressing this issue. Its first, *Johnson v. Daley*, 339 F.3d 582 (7th Cir. 2003) (en banc), reached the same result via a different theory, but the reasoning of *Johnson* is no more supportable than the reasoning of the decision below.

In *Johnson*, the Seventh Circuit concluded:

> As we read subsection (2), attorneys' compensation comes *first* from the damages, as in ordinary tort litigation, and only if 25% of the award is inadequate to compensate counsel fully may defendant be ordered to pay more

> under § 1988. Cf. *Gisbrecht v. Barnhart*, 535 U.S. 789 (2002) (using this approach in Social Security cases, where any excess would be provided by the Equal Access to Justice Act, 28 U.S.C. § 2412(d), rather than § 1988).

Johnson, 339 F.3d at 584-85 (parallel citation omitted). This was *Johnson*'s complete treatment of the issue, an issue that was not litigated by the parties or addressed by any of the en banc court's concurring or dissenting opinions.

Johnson's analogy to *Gisbrecht* is a very poor one. In the passage from *Gisbrecht* to which the Seventh Circuit evidently referred, the Court was addressing a completely different question—what to do when plaintiff's counsel is eligible for attorney's fees under two federal statutes in the same case. The Court explained that counsel is not entitled to a double award of fees, so any award under one statute must be offset by an equivalent reduction of the award under the other statute. *Gisbrecht*, 535 U.S. at 796. In *Gisbrecht*, one of the two statutes was 42 U.S.C. § 406(b), which authorizes a court to award plaintiff's counsel attorney's fees in Social Security cases, to be paid out of the judgment recovered by the plaintiff. Under section 406(b), the attorney's fees may not exceed 25 percent of the past-due benefits the plaintiff was awarded in the judgment. The Court observed that if plaintiff's counsel receives attorney's fees out of the judgment under section 406(b), and also receives attorney's fees under the Equal Access to Justice Act, counsel must refund the appropriate amount to the plaintiff, so counsel is not being compensated twice. *Id.*

This discussion in *Gisbrecht* has nothing at all to do with the issue in our case and in *Johnson v. Daley*, other than the fact that they both involve attorney's fees and the phrase "25 percent." *Gisbrecht* might have some relevance if a prisoner's counsel were entitled to attorney's fees under two different federal statutes, but that is an uncommon situation that was not present in *Johnson* and is not present in our case. In *Gisbrecht* the Court simply did not speak to our issue.

Moreover, the text of the statute directly contradicts the Seventh Circuit's assertion in *Johnson* that "only if 25% of the award is inadequate to compensate counsel fully may defendant be ordered to pay more." *Johnson*, 339 F.3d at 585. The statute says nothing of the kind. It says that the portion of the judgment is "not to exceed 25 percent," not that it must equal 25 percent.

Johnson v. Daley is so unpersuasive that for many years the district courts within the Seventh Circuit disregarded its comments on section 1997e(d)(2) as ill-considered dicta. *See, e.g.*, *Gevas v. Harrington*, 2014 WL 4627616, *3 (S.D. Ill. 2014); *Cornell v. Gubbles*, 2010 WL 3937597, *2 (C.D. Ill. 2010); *Farella v. Hockaday*, 304 F. Supp. 2d 1076, 1080-81 (C.D. Ill. 2004). The district court in our case did the same. Pet. App. 27a. In fact, in *Johnson v. Daley* itself, on remand, the district court disregarded the Seventh Circuit's discussion of the issue and applied only 5% of the judgment toward the attorney's fees. *Johnson v. Daley*, 2003 WL 23274532, *1 (W.D. Wisc. 2003). The Seventh Circuit's first try at interpreting the statute was thus just as implausible as the decision below.

3. For more than twenty years now, the district courts—even in the Seventh Circuit, until this case—have been exercising the discretion the statute plainly confers. On several occasions during this period, Congress has considered bills and held hearings to amend various aspects of the Prison Litigation Reform Act. *See* H.R. 3718, 105th Cong. (1998); S. 2163, 105th Cong. (1998), §§ 15-17; H.R. 12, 106th Cong. (1999); S. 248, 106th Cong. (1999), §§ 15-17; H.R. 4109, 110th Cong. (2007); H.R. 4335, 111th Cong. (2009); *Private Prison Information Act of 2007, and Review of the Prison Litigation Reform Act: A Decade of Reform or An Increase in Prison and Abuses?: Hearing on H.R. 1889 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. (2007); *Prison Abuse Remedies Act of 2007: Hearing on H.R. 4109 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. (2008). Yet in all this time, Congress has given no indication of any interest in eliminating the district courts' widely-recognized discretion to choose the portion of the judgment to apply toward attorney's fees.

Where the lower courts have virtually unanimously interpreted a statute in a particular way over an extended period of time, especially where Congress has had ample opportunity to intervene, "we have recognized that Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that Congress at least acquiesces in, and apparently affirms, that interpretation." *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988) (citation, brackets,

and internal quotation marks omitted). *See also Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-86 (1983); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731-33 (1975); *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 200-01 (1974). On respondents' view of the statute, the vast majority of courts have been flouting the will of Congress for two decades, without a peep from Congress. On our view, the courts have been getting it right.

B. The statute's context confirms that district courts have this discretion.

Given the clarity of the statute's text, there is no occasion for the Court to go further. But if there were, the context surrounding section 1997e(d)(2) would confirm that district courts have the discretion to apply less than 25 percent of the judgment to attorney's fees.

Congress's fee-shifting statutes typically "confer[ ] broad discretion on district courts." *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1988 (2016). As the Court has explained, "litigation is messy, and courts must deal with this untidiness in awarding fees." *Fox v. Vice*, 563 U.S. 826, 834 (2011). For this reason, when Congress provides for the award of attorney's fees, Congress virtually always authorizes district courts to exercise considerable discretion. *See Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013) (providing several examples of highly discretionary fee-shifting statutes); *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 254 (2010) ("Statutes vesting judges with such broad dis-

cretion are well known in the law, particularly in the attorney's fees context.").

The statutory scheme governing the award of attorney's fees in prisoner cases is no exception. To begin with, the court's authority to award fees comes from 42 U.S.C. § 1988(b), which simply states: "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee." If the court does award attorney's fees, the only constraint in section 1988 is that they must be "reasonable." As the Court has emphasized, under section 1988 "the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

The PLRA was enacted against this backdrop. Pub. L. No. 104-134, tit. 8, §§ 801-810, 110 Stat. 1321, 1321-66 to 1321-77 (1996). The PLRA imposed some restrictions on fee awards in prisoner cases, but these restrictions are likewise expressed in highly discretionary terms. Attorney's fees must be "directly and reasonably incurred in proving an actual violation of the plaintiff's rights." 42 U.S.C. § 1997e(d)(1)(A). The amount of the fee must be "proportionately related to the court ordered relief," *id.* § 1997e(d)(1)(B)(i), or "directly and reasonably incurred in enforcing the relief," *id.* § 1997e(d)(1)(B)(ii). Fees must be "not greater than 150 percent of the judgment," *id.* § 1997e(d)(2), and the hourly rate used to calculate the fee may not exceed 150 percent of the rate for appointed criminal

defense counsel, *id.* 1997e(d)(3). Finally, of course, the plaintiff must pay "a portion of the judgment (not to exceed 25 percent)" toward the fee. *Id.* § 1997e(d)(2).

All this discretionary language indicates that in enacting the PLRA, Congress did not divest the district courts of most of their traditional discretion regarding attorney's fees. Whether to award attorney's fees in the first place remains committed to the district court's discretion. So does the amount of the fee, subject to the two 150 percent caps. In this context, it is hardly remarkable that Congress would likewise authorize district courts to exercise discretion regarding the apportionment of the fee.[1]

Indeed, the wording of section 1997e(d)(2) is identical or nearly identical to that of other statutes that plainly authorize district courts to exercise discretion over attorney's fees. For example, in suits involving the life insurance policies available to veterans, the court "shall determine and allow reasonable ... fees *not to exceed* 10 per centum of the amount recovered." 38 U.S.C. § 1984(g) (emphasis added). In suits to recover Social Security benefits, the district court may allow "a reasonable fee ... *not in excess* of 25 percent of the total of past-due benefits." 42 U.S.C. § 406(b)(1)(A) (emphasis added). Section 1997e(d)(2), which provides that district courts may

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[1] Other provisions of the PLRA sharply restricted district courts' discretion to impose injunctive relief. In this respect, "curbing the equitable discretion of district courts was one of the PLRA's principal objectives." *Miller v. French*, 530 U.S. 327, 339 (2000). Congress did not enact comparable curbs on the discretion of district courts regarding attorney's fees.

choose a portion of the judgment "not to exceed 25 percent," confers similar discretion.

C. Discretion regarding the apportionment of attorney's fees best serves the purpose of the PLRA.

Because the statute's text is so clear, there is no occasion to consider the purpose of the statute. *Boyle v. United States*, 556 U.S. 938, 950 (2009). But if there were, it would be apparent that this discretion directly advances the purpose of the Prison Litigation Reform Act—to discourage frivolous prisoner suits without discouraging meritorious ones. "What this country needs, Congress decided, is fewer and better prisoner suits." *Jones v. Bock*, 549 U.S. 199, 203 (2007). "To that end, Congress enacted a variety of reforms designed to filter out the bad claims and facilitate consideration of the good." *Id.* at 204.

This purpose is evident throughout the PLRA's legislative history. *See, e.g.*, 141 Cong. Rec. 35,797 (1995) (Sen. Hatch) ("The crushing burden of these frivolous suits is not only costly, but makes it difficult for courts to consider meritorious claims."); *id.* at 38,276 (Sen. Kyl) ("If we achieve a 50-percent reduction in bogus Federal prisoner claims, we will free up judicial resources for claims with merit by both prisoners and nonprisoners."); *id.* at 20,992 (Sen. Reid) ("I am going to push hard for this legislation. Our judges ought to be spending more time hearing meritorious cases."). It is "[b]eyond doubt" that Congress enacted the PLRA "to reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

The attorney fee provisions of 42 U.S.C. § 1997e(d) were part of this effort at separating the frivolous from the meritorious prisoner suits. *Woodford v. Ngo*, 548 U.S. 81, 84 (2006). The effect of these provisions was to ensure that lawyers have a financial stake in the quality of their cases. They get paid only if they win, and they receive only as much compensation as is directly and proportionately related to the relief they secure. These provisions were intended to deter counsel from taking on prisoner cases that lack merit, and to encourage counsel to represent prisoners in the meritorious cases.[2]

The assistance of counsel in meritorious cases is crucial, because prisoners are in no position to litigate these cases themselves. A person who is incarcerated cannot conduct most kinds of investigations or interview most witnesses. Prisoners are usually indigent, so they cannot pay for litigation expenses such as deposition costs or expert fees. Many prisoners lack sufficient literacy to prepare the necessary documents. It is not surprising that pro se prisoners fare very poorly in litigation, and that hiring a lawyer greatly improves a prisoner's chance of success. Schlanger, *Inmate Litigation*, 1610-12.

To ensure that lawyers have a financial incentive to represent prisoners in meritorious cases, Congress preserved fee-shifting under section 1988 to the extent fees are "directly and reasonably incurred in proving an actual violation of the plaintiff's rights."

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[2] Funding from the Legal Services Corporation may not be used to litigate on behalf of prisoners. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(15), 110 Stat. 1321, 1321-55 (1996). To receive any compensation, prisoners' attorneys have to win.

42 U.S.C. § 1997e(d)(1)(A). Congress also preserved the ability of counsel to take cases on a contingent fee, without placing any cap on the percentage counsel may charge. *Id.* § 1997e(d)(4). (A contingent fee is necessary when cases settle, because statutory fees are not available under 42 U.S.C. § 1988 in such cases.) This uncapped contingent fee for suits by prisoners stands in sharp contrast with the analogous provision for suits under the Federal Tort Claims Act, which caps contingent fees at 25 percent of the judgment, 28 U.S.C. § 2678; with the analogous provision for suits under the Veterans' Benefits Act, which caps contingent fees at 20 percent of the judgment, 38 U.S.C. § 5904(d)(1); and with a handful of similar limits on contingent fees in other areas, 22 U.S.C. § 1623(f); 48 U.S.C. § 1424c(f); 50 U.S.C. § 4317.

For fee-shifting to be effective in providing prisoners with counsel, the fee must be "sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case." *Perdue v. Kenny A.*, 559 U.S. 542, 552 (2010). In the attorney fee provisions of the PLRA, it is clear that Congress aimed not just to discourage lawyers from representing prisoners in weak cases, but also to encourage lawyers to represent prisoners in strong ones.

Section 1997e(d)(2) advances this purpose as well. By exercising their discretion to choose the "portion of the judgment (not to exceed 25 percent)" to be applied to attorney's fees, district courts are able to ensure that prisoners keep a greater share of their recovery, and that defendants pay more, in the more egregious cases. These are the cases where there is greatest reason to deter culpable conduct on the part

of prison officials, and the greatest need for prisoners to retain counsel to help them obtain relief.

The district courts have been exercising their discretion to provide these incentives. Where the defendant's conduct is particularly shocking or blameworthy, district courts often apportion less than 25 percent of the judgment to attorney's fees. *See, e.g.*, *Percelle v. Pearson*, 2017 WL 2688073, *8 (N.D. Cal. 2017) (determining that 10 percent is "an amount that reflects the degree of Defendants' culpability and the potential that a fee award may deter other correctional officers"); *Rodriguez v. Cty. of Los Angeles*, 96 F. Supp. 3d 1012, 1026 (C.D. Cal. 2014) (apportioning 1 percent because the defendants committed acts of "malicious violence leaving some Plaintiffs permanently injured"); *Hernandez v. Goord*, 2014 WL 4058662, *13 (S.D.N.Y. 2014) (apportioning 5 percent because that amount "is sufficiently small that it will neither detract from the jury's decision to punish defendants by awarding punitive damages, nor deter prisoners from bringing meritorious claims in the future"); *Blake v. Maynard*, 2013 WL 3659421, *2 (D. Md. 2013) (apportioning a nominal $1 because the defendant prison guard acted "maliciously and sadistically"); *Dykes v. Mitchell*, 2009 WL 3242006, *2 (E.D. Mo. 2009) (apportioning 5 percent because "the degree of defendant Mitchell's culpability was high" and because "an award of attorneys' fees against Mitchell could deter other persons acting under similar situations"); *Hall v. Terrell*, 648 F. Supp. 2d 1229, 1231, 1236-37 (D. Colo. 2009) (apportioning 10 percent where the prisoner was a victim of "sexual abuse and a brutal rape" by a prison guard); *Farella v. Hockaday*, 304 F. Supp. 2d 1076,

1081-82 (C.D. Ill. 2004) (apportioning 10 percent because defendant prison guard "initiated the incident maliciously, to harm Plaintiff for not cooperating as his 'stool pigeon'").

Our case is a good example. Respondents handcuffed Charles Murphy and administered such a savage beating that they crushed his eye socket. To this day, six years later, his vision remains doubled and blurred. The jury recognized respondents' culpability by awarding punitive damages. This is exactly the kind of case in which one would expect the district court to apportion less than the maximum 25 percent.

By contrast, where the defendant's conduct is less egregious, the district courts often apportion the maximum 25 percent. *See, e.g.*, *Perry v. Roy*, 2016 WL 1948823, *7 (D. Mass. 2016) (apportioning 25 percent in suit against prison nurses who failed to examine prisoner's injury); *Harris v. Hobbs*, 2013 WL 6388626, *2 (N.D. Fla. 2013) (apportioning 25 percent because "[o]n the spectrum of constitutional violations for which attorney's fees can be awarded, the violations here fall toward the end warranting less, not more, deterrence. None of the violations warrant the extra dose of deterrence that would come from declining to require Mr. Harris to bear his own fees up to the maximum permissible 25% of the underlying judgment.").[3]

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[3] The Eighth Circuit has suggested that district courts should consider four factors: (1) the degree of the parties' culpability, (2) the parties' ability to pay attorney's fees, (3) the deterrent value of requiring the defendant to pay, and (4) the relative merit of the parties' positions. *Kahle v. Leonard*, 563 F.3d 736, 743 (8th Cir. 2009). District courts may also consider "other

In their Brief in Opposition (BIO 16-17), respondents worried that a literal interpretation of the statute will engender collateral litigation over the appropriate percentage of the judgment to be applied to attorney's fees. This worry is unfounded. We now have more than twenty years of experience under section 1997e(d)(2). The district courts typically *apportion* attorney's fees at the same time they determine the appropriate *amount* of attorney's fees. Determining the amount of fees requires some care, because the court must calculate a reasonable number of hours and the correct hourly rate. But once the court has made these decisions, choosing the appropriate percentage of the judgment the plaintiff should pay takes very little time. By that point, the court has already presided over the case from start to finish. The court already knows everything about the case. No additional litigation is required.

Our case is again a good example of how the district courts address this issue. After considering the submissions of the parties, the district court carefully determined the reasonable hourly rate, Pet. App. 20a-22a, and the reasonable number of hours worked, Pet. App. 22a-26a. After making these determinations, the district court turned to apportion-

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relevant considerations," and they "need not mechanically apply these factors," because they have "broad discretion in determining an appropriate percentage under § 1997e(d)(2)." *Id.* In practice, the Eighth Circuit's standard differs little from an assessment of the defendant's culpability. Factors (1), (3), and (4) are just different ways of restating that assessment. Factor (2) is identical in virtually all cases, because the plaintiff is almost always an indigent prisoner, while the defendants in these cases are state prison employees whose attorney's fees are normally paid by the state.

ment under section 1997e(d)(2). Pet. App. 27a. The court already knew the facts of the case, having just presided over the trial. Without any additional litigation, the court determined that 10 percent would be an appropriate share of the attorney's fees for the plaintiff to pay. Pet. App. 27a.

The problem Congress sought to solve in the PLRA was not that district judges were exercising too much discretion over attorney's fees. The problem was that prisoners were filing too many frivolous suits. The district judges were meant to be part of the *solution*: The PLRA empowered them to shed the weaker cases and facilitate the stronger ones. Using their discretion to apply "a portion of the judgment (not to exceed 25 percent)" to the attorney's fees, along with the other tools they acquired under the PLRA, the district courts have been doing just that.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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APPENDIX

42 U.S.C.A. § 1997e

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.

(c) Dismissal

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 19881 of this title, such fees shall not be awarded, except to the extent that--

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

(B)

(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18 for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 19881 of this title.

(e) Limitation on recovery

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18).

(f) Hearings

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

(g) Waiver of reply

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983 of this title or any other Federal law. Notwithstanding any other law or rule of procedure, such

waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) "Prisoner" defined

As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.